C.D. Howe Institute

Trade Monitor

No. 11, July 1989 ISSN 0836-0820

How to Make the Free Trade Agreement Work:

Implementing the Dispute Settlement Measures and the Subsidies Code

by

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Introduction

After the emotional nature of the debate on free trade during the 1988 federal election campaign, the actual implementation of the Canada-U.S. Free Trade Agreement has been something of an anticlimax. Tariffs are being reduced, national treatment is being applied to covered services, temporary entry for business purposes is easier to achieve, and other measures are unfolding in a predictable manner. Even adjustment policy has failed to excite much attention, with the de Grandpré Report[1] confirming earlier analysis which suggested that business strategies for free trade are well advanced and capable of handling many of the costs of adjustment.[2]

One area of the Agreement, however, contains a pregnant silence waiting to burst forth into controversy: the method by which its dispute settlement provisions will be put into operation and the Subsidies Code negotiated. These unfinished items continue to demand the attention of researchers, trade lawyers, policymakers, and politicians. They are particularly important to Canadians, and their successful implementation will require a proportionally greater effort by Canada's negotiators than by their U.S. counterparts.

It is imperative to deal as expeditiously as possible with many of the important unanswered questions that still surround the Agreement's mechanisms for dispute settlement. Chapter 19 of the Agreement introduces new, five-person panels to hear appeals on countervail and antidumping cases. Chapter 18 contains similar far-reaching panels to hear appeals concerning all other aspects of the Agreement. Chapter 19 also authorizes a Working Group to negotiate

a new Canada-U.S. Subsidies Code over the next five to seven years. The eventual goal of the Group is to replace the present appeals mechanism.[3]

Under the terms of Chapter 19, 25 trade experts from each country have been named to the binational appeals roster. Most of these 50 individuals are experienced trade lawyers or professors of trade law. They face interesting challenges, since they will be responsible for bringing discipline to what Canadians perceive as the unfair use of U.S. trade-remedy laws by U.S. corporations. Canadian companies hope that binational panels can stop the use of what they believe are protectionist measures by their U.S. rivals.[4]

An opportunity also exists to change the perceived procedural bias in the administration of U.S. trade law. The binational panel will replace domestic judicial review, thereby offering a different forum, with potential new dynamics, even when using U.S. standards of judicial review. The nature of U.S. administrative law will permit the appeals body to use its expertise to examine the administrative record. While deference usually will be given to the investigating agency, it is entirely appropriate for the binational panel to require that the agency explain the rationale it used to reach its decision.

Some U.S. lawyers have recognized that the bilateral panel system will lead to new interpretations of U.S. trade law.[5] Thus, with some Canadian political pressure and the development of technical knowledge, there is every reason to believe that both the appeals mechanism and the outcome of the Subsidies Code negotiations will succeed in bringing order to trade disputes between the two parties, to the mutual satisfaction of both U.S. and Canadian business interests.

Administered Protection

The changes that Canada expects in the administration of U.S. trade law grew out of the recognition by Canadian corporations that the United States' use of countervail duty and antidumping actions against them has escalated, particularly in the resource sectors, since 1980. At that time, the United States gave up its grandfathered rights on domestic countervail tests and accepted the Subsidies Code of the General Agreement on Tariffs and Trade (GATT), signed in 1979 at the conclusion of the Tokyo Round.

Using the GATT Subsidies Code as subsequently amended and adopted by the U.S. Congress, the U.S. International Trade Commission (ITC) tests for "material" injury. More specifically, the ITC is required to consider a variety of economic variables affecting the competitiveness, performance, and profitability of the U.S. plaintiff to assess if there is material injury, or the "threat of material injury," by reason of the subsidized imports.

Canadian trade economists and other experts argue that U.S. corporations have seized the opportunity to pursue such legal means to deny entry at reasonable prices to a variety of foreign competitors, including Canadian exporting companies in the fish, lumber, live swine, steel, potash, and other industrial and agricultural sectors. The United States uses countervailing duty measures to a much larger degree than does any other country; during the 1980–87 period, it launched 308 cases (62 percent of the world total).[6] The only other country that uses countervail to any degree is Chile, which initiated 135 cases (27.2 percent of the world total) during the same period. Yet, only one Chilean case ever resulted in an affirmative final determination.[7] Canada launched just 18 cases (4 percent of the world total) during this period, and only one case (involving corn) against the United States was successful.

The Department of Finance has calculated that U.S. countervail actions affected $4.2 billion worth of Canadian exports in 1986, while Canada's corn countervail case affected just $9 million worth of U.S. exports. The impact of antidumping orders on the

value of goods, however, has been similar in the two countries ($295 million for Canadian exports to the United States, and $375 million for U.S. exports to Canada).[8]

The singular use of countervailing duties by U.S. corporations is based on the myth that U.S. industries are not subsidized, or that such subsidies are generally available. This perception may be hard to overcome, as relatively little work has been carried out to evaluate the impact of U.S. subsidy practices on foreign countries at the user level.[9] As Americans are unprepared to do this work themselves, it may be necessary for foreigners to evaluate the nature of U.S. federal and state subsidies.[10]

One study examines all 50 U.S. countervail and antidumping cases against Canada during the 1980–86 period.[11] It observes that the ITC would find material injury routinely (in 70 percent of the cases) in its preliminary determination leading to the U.S. Commerce Department's more objective determination of the damage caused by the subsidy and the duty to be imposed.

It should be noted that the Agreement has opened up for domestic judicial and panel review the dumping and subsidy margin determinations made by Revenue Canada and the U.S. Commerce Department. In the case of Revenue Canada, this should prove interesting since it will now face external review of its decisions. Over the years, however, the U.S. Commerce Department has been much more transparent in its operations and has published in various appendices of the *Federal Register* how it determines its decisions.

While there may be some disagreement on the economic validity of some of the Commerce Department's methods, the major problem lies with the ITC, which has to show the "material" linkage between the dumping or subsidy margin and the so-called "trade injury" to the U.S. plaintiff(s). In most cases, this is not transparent and lacks any rigorous economic analysis or decisionmaking based on economics.[12]

Despite its being more objective, the Commerce Department has not remained free of criticism either, primarily in regard to the methodology it uses to calculate subsidy or dumping margins. Although the ITC's final positive determinations during the 1980–86 period were less damaging to Canadian interests than were the preliminary decisions of the Commerce Department (material injury being found in only 30 percent of the cases), the year-long investigation process inflicted considerable expense and damage on Canadian companies. In short, U.S. corporations seemed to have finessed the trade-remedy-law process by using it as a corporate strategic weapon against their Canadian rivals. Therefore, it is vital for Canadians to understand fully the nature of U.S. trade law investigative procedures and the methodology the ITC uses to determines injury.

Because of its own experience of the problem, the Canadian business community complained to the federal government about this new form of U.S. protectionism. During the free trade negotiations over the 1986–88 period, business representatives on the government's advisory committees urged that chief negotiator Simon Reisman find a solution to administered protection.

Canadian insistence on this point led to the suspension of negotiations and a subsequent U.S. proposal to adopt a binational panel system to settle disputes, with binding powers to conduct appeals on countervail and antidumping cases. This proposal, which eventually was included in Chapter 19 of the Free Trade Agreement, specifies the duties, membership, and power of these unique dispute settlement mechanisms. The Agreement was subsequently endorsed by the International Trade Advisory Committee and the Sectoral Advisory Groups on International Trade. Business support for the Agreement and for its dispute settlement mechanisms then became an important element of the 1988 election debate.

Agenda for the New Panels

From Canada's perspective, the Agreement is a way to remedy the worst excesses of the current administration of U.S. trade laws, which Canada sees as permitting a bias toward U.S. industries at the expense of Canadian exporters. The method the Agreement uses is the binational panel, whose judicial reviews of the administrative record of each case, it is hoped, will ensure a better examination of the application of U.S. trade laws against Canada. This, in turn, may ensure that the actual administration of antidumping and countervailing duty actions is improved, thereby decreasing any bias toward U.S. industries. Articles 1902(1) and 1904(2) of the Agreement permit the panels to review five aspects of U.S. trade law: statutes, legislative history, regulations, administrative practices, and judicial precedents. While the nature of this review will be subtle and indirect, the mere existence of the new appeal process should help to reduce frivolous cases and discipline the administration of trade-remedy laws, since the panels' decisions will attract their fair share of publicity.

With Chapter 19 and its institutional provisions, it is expected that the administration of U.S. trade laws will become more objective. What Canada ultimately believes it has gained by signing the Agreement is the ability to influence future U.S. trade-law decisions. For example, in the event of a disputed affirmative decision by the ITC (where a 3–3 vote counts as positive), it would be possible for a binational appeal panel to review the evidence contained in reports and statements of specific ITC Commissioners or by outside economists retained as expert witnesses by Canadian corporate defendants.

This is a timely improvement in the process, since, until recently, the ITC's six Commissioners have been divided into two equal camps on the relevance of economic tools in deciding what constitutes material injury in trade-law cases. The composition of the ITC changed in 1988, however, with the departure of a "pro-economics" Commissioner and his replacement with a "non-economics" Commissioner.[13] It appears that the reason why some ITC members do not view economics as providing a useful explanation of material injury lies in the use of a bifurcated system that tests separately for material injury and for the subsidy or dumping margin which allegedly caused the injury to domestic producers. Some Commissioners apparently believe that since a linkage is not necessary, there is no need to use (economics-based) tools to determine such a linkage.

In short, it is possible for a binational panel to review the economic evidence and reasoning used by the ITC or by the International Trade Administration at the Department of Commerce, and to overturn a decision if it rules that these agencies have offered an inadequate explanation of their reasoning. This review process, in turn, may pressure these U.S. agencies to tighten up their investigative methods.

The ability to review the "economic rationale and evidence" behind the decisions of administrative agencies in the two countries should not increase the time in which a panel is supposed to reach a verdict. Panelists will not be undertaking economic analysis but merely reviewing analysis that has already been carried out and then remanding the case back to the agency responsible if they feel the economic justification is inadequate.

The provisions of Chapter 19 permit such a substantive review when an appeal is based on the concern that the administrative agency responsible has made an egregious error in the application of U.S. trade-remedy law. Since all Chapter 19 cases will involve trade-law issues based on a test of material injury (an economic concept), there will be an opportunity to review the economic basis of an ITC decision.

The United States has also gained from the adoption of the new appeals process. U.S.

corporations that worried they might lose their right to appeal unfair Canadian practices are still allowed full access to the technical remedies available under U.S. antidumping and countervail legislation. The only change is that, rather than appealing to the U.S. Court of International Trade, they now have the option to appeal to the Agreement under Chapter 19. There is no reason to believe that a Chapter 19 panel will be any less objective than was the U.S. Court of International Trade. In fact, it is likely that this new process will be more objective.[14]

The Canada-U.S. Subsidies Code

An area of potential opportunity for Canada is the inclusion in Chapter 19 of the requirement to negotiate a new Canada-U.S. Subsidies Code over the next five to seven years. In order to take full advantage of this opportunity, however, it is imperative that the Canadian government appoint a negotiator who is prepared to deal as expeditiously as possible with the issue of subsidies. This is required, since Section 102(c) of the U.S. *Implementation Act of 1988* allows only 30 days in which to enact, on the "fast track", any arrangement resulting from negotiations on subsidies or other issues still required under the Free Trade Agreement. If there is no agreement within that time, amendments to the Subsidies Code can then be made by members of Congress, with all the political lobbying and pressure from special-interest groups that this procedure implies. While the fast track might be renewed or extended, this is a gamble, especially if Congress again bends to protectionist winds over the next two years.

The U.S. Congress, through its committees, is still likely to have a say in the contents and outcome of the final package in spite of the fast-track process, but at least the package will be the one that Canada negotiated. Without the fast-track process, there is no assurance that amendments and individual bills will not be tendered that would fragment and reduce the overall effectiveness of the package. Failure in these ongoing negotiations could, in effect, make key parts of the Agreement worthless.

While the U.S. agenda will require an examination of Canadian measures, such as regional development subsidies and other well-known programs, the negotiations will also give Canada the opportunity to examine U.S. practices.[15] It will, however, be more difficult to assess U.S. subsidies, as many of these are indirect or hidden by the U.S. political system.

Research in Canada on the nature and extent of U.S. subsidies has focused on federal government programs.[16] Few state programs have been identified, let alone evaluated. No publicly available studies have examined the economic impact of either state or federal programs.[17]

In general, there is little recognition in the United States of the extent to which U.S. industry is subsidized through defense contracts, selective government procurement, and state development aid. Even U.S. agriculture, which is heavily subsidized, has rarely faced external discipline, since U.S. trade laws, like most domestic trade-law systems, investigate only foreign subsidies, never those given to domestic producers.

The Canadian subsidies negotiator has a dual problem. First, it is necessary to make this a political issue in the United States by informing and educating Americans about their subsidies. This is a political job, one which needs to be handled delicately but with force. Second, it is vital to have the data on hand about the extent and impact of U.S. subsidies. This will require the immediate commissioning of research on the extent of state as well as federal subsidy programs, first at the industrial level and then, more importantly, at the user level.

The issues of countervailing duties, the Subsidies Code, and antidumping are also related to the use of Section 301 of the U.S.

Omnibus Trade and Competitiveness Act of 1988. This section aims to eliminate significant trade barriers and trade-distorting practices that affect U.S. exporters. While Canada has been exempted implicitly from these provisions through the Free Trade Agreement, it should be aware of the fact that the U.S. Congress has a habit of drawing up new "rules" when it feels that the "old" ones are not sufficient in achieving U.S. trade policy objectives. Thus, negotiations on the Subsidies Code and other outstanding matters in the Agreement should aim to insulate Canada from any possible future U.S. protectionist measures.

Opportunities of the New Appeals System

Canada expects to gain a great deal from the new panel procedure. The fact that the appeals system is part of a trade deal between Canada and the United States, combined with a specific review process, changes the status and nature of dispute settlement between the two countries. The technical process was changed because Canada believed that the new dispute settlement process would be a material improvement over the old review process. This puts a certain amount of pressure on panel members to keep in mind the political reason for the new system, which was a key reason why Canada signed the Agreement in the first place. A failure of the new dispute settlement mechanism, therefore, may have negative consequences for the success of the Agreement as a whole.

In light of this, it should be realized that the first few cases heard before the binational panels will be extremely important. Canada needs to develop a strategy to make effective use of this new process. From a Canadian perspective, the use of binational appeal panels to review antidumping and countervailing cases gives rise to the possibility of a variety of opportunities in the implementation of these procedures.

The appointment of trade experts, both lawyers and non-lawyers, to the panels should improve the objective application of U.S. trade-remedy law, since the judge at the U.S. Court of International Trade responsible for the appeals was not always familiar with the topic of the case at hand. The greater degree of expertise residing in the members of the new appeals system should change the way the review operates. This should help to improve the content of the decisionmaking process, since panel members will have to interact with fellow experts in formulating an opinion. A binational panel also should be better placed to consider Canadian corporate concerns about the use of U.S. trade laws and their abuse as strategic weapons by rival U.S. producers.

Unanswered questions, however, still surround the working of the new panels. The most important of these from Canada's perspective is whether they will be able to examine economic-based evidence presented during an antidumping or countervail case. Presumably, a panel will sit as a "court" and conduct its review by hearing adversarial arguments. The greater number of experts sitting means that the panel will have the potential to conduct a deeper and fresher look at unresolved legal issues. If one of the parties alleges that an egregious error has been made, it is also possible that the panel will hear arguments pertaining to the economic substance of a case, rather than to defer to the agencies where the expertise is assumed to reside.

The Issue of Deference to the Administrative Agencies

The new panels may be legally constrained from operating as well as Canada would like. One area of particular concern is the question of whether they will be restricted to the use of U.S. jurisprudence and precedents or whether they will be able to make their own new decisions.

Limitations of the Panels' Jurisprudence

While Article 1904.3 of the Agreement makes clear the panels' scope of review, it is not yet clear how they will work out in practice.[18] For example, U.S. trade-law experts have argued that only prior U.S. legal precedence and jurisprudence should be taken into consideration when investigating an antidumping or countervailing case. This argument, however, misses the key point — namely, that there is nothing wrong with how U.S. trade-remedy law has been legislated, only with its administration within the agencies. Furthermore, some U.S. trade lawyers argue that the panels should review only the same "traditional" sources of precedence as the U.S. Court of International Trade would have examined. These sources, of course, were developed for a purely domestic U.S. legal regime, whereas the Agreement involves two sovereign countries. Yet, the work of the binational panels will be transparent, and the high visibility of their work and decisions undoubtedly will have a positive impact on the domestic agencies, leading to an improvement in the process of trade-law administration.

As each country has norms or perceptions of what is "correct" conduct, these norms are strengthened and expanded within and by its legal framework. Thus, while it may be appropriate for a unilateral court to examine unilateral issues, it does not seem to be appropriate to have this same constraint apply to a bilateral "court" — in effect, the binational panels under Chapter 19. The dual norms of the system must be taken into account to some degree, or the purpose of having binational panels is completely defeated.

One way the panels could implement new jurisprudence would be to rely more on the GATT Subsidies Code for judgments rendered under U.S. statutes in order to assist panel members in reaching a decision. Once GATT-based criteria are considered, the bifurcated U.S. method of testing for subsidy or dumping by reason of material injury can be reviewed more objectively and broadly than under current appeals of U.S. trade law. After all, Canada and the United States both claim that the test for material injury is based on GATT principles. The United States adopted these provisions in the 1979 *Trade Agreements Act* after bargaining in the Tokyo Round of the GATT. If the panels refer back to the initial ideals and principles that underlie the adoption and agreement of the GATT Subsidies Code, many of the practices in the administration of U.S. trade law that foreigners regard as economically suspect and even abusive would be detected.

Another issue is that each trade-law appeal requires that a new panel be formed and then disbanded after the case has been heard. This raises the question of whether, under the strictest interpretation of "judicial review", a panel can create its own jurisprudence, which another panel may then adopt for its decision. This problem is

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ISBN 0-88806-246-X

evident when one realizes that many U.S. cases may not have clear precedence behind them. Therefore, each panel likely will have to decide which precedents it will follow, thereby creating its own body of case law. If a panel is unable to make its own jurisprudence in this fashion, the alternative is a complete lack of continuity. This will lead to a multiplicity of panel decisions and create further confusion.

Some people have also pointed out that confusion may arise as a result of split appeals. This might occur if different parties appealed the same case to a domestic court and to the binational panel mechanism. However, such an action would most likely lead to the formation of a Chapter 18 panel to clarify the intent of the Agreement. The outcome would be most unsatisfactory if both bodies heard the case and then remanded different requirements back to the agencies concerned. In all events, it may be useful to clarify this issue before such a situation occurs.

Continuity of Panel Members

A secondary question concerns the composition of the panels. Will a panel be restricted only to new members when it reviews an issue that has already occurred in a previous case? If panel members cannot hear a case that covers ground they have considered before, then it could be argued that the expertise of the panel system is being restricted. Yet, if they can hear such a case, it could be argued that panel members, in effect, are reviewing themselves, which would not be fair to the plaintiff(s) or the defendant(s). This problem arises in part because Chapter 19 lacks the hierarchical system of the unilateral U.S. system, which permitted legal actions eventually to go to the U.S. Supreme Court. This course of action is no longer available under Chapter 19.[19] This was not as acute a problem in Canada, since the decisions of Revenue Canada were not open to public review.

There are a number of steps that panel members could take to ensure that their deliberations are fair and transparent.

First, members must be truly independent of any case they hear. This may require that all objections to the qualification of panelists be heard prior to, rather than after, the case review — as is implied under Annex 1903.2(4) of the Agreement, which could permit a challenge to a decision by questioning the independence of panel members after a decision has been rendered. This may lead to an extraordinary challenge under Annex 1904.13.

Second, panel members should try to maintain as much consistency as possible in the character and quality of their judgments (even if there is disparity in prior precedence in their cases).

Third, they should try to release as much information as possible concerning the reasoning behind their decisions — including dissenting opinions, if any, which are permitted under Annex 1903.2(3).

Finally, there should be a degree of consistency in the review process and procedures, with as many of the procedures as possible determined before a panel review begins.

In most instances, these problems will be eliminated or reduced according to the diligence of the Agreement Secretariat staffs in handling the substantive issues before a panel proceeds with a case — perhaps, for example, through the use of prehearing conferences. A process is in place that would permit either government to disqualify up to two panelists, and there is a Code of Conduct that obliges prospective panelists to disqualify themselves at the onset in defined circumstances. It should be made clearer, however, as to how defendant(s) or plaintiff(s) are permitted to challenge the qualifications of a panel member. Relying on governments or on the decisions of individual panel members may not always be a first, best option in ensuring the panelists' independence.

Conclusion

Canada and the United States, in signing the Free Trade Agreement, have taken a positive step toward the continued liberalization of their bilateral trade. Now, however, it is time to move on to the tougher business of making the Agreement work in practice as well as on paper. For Canada, clearer decisionmaking is particularly necessary on rules governing the use of precedents for dispute settlement.

Decisions will also have to be made concerning negotiations on a new Canada-U.S. Subsidies Code, as required under Chapter 19 of the Agreement. In order to sustain the momentum of the Agreement, Canada has to do its homework on the nature and impact of U.S. subsidies, and it needs to keep U.S. attention focused on the innovative aspects of the new dispute settlement mechanisms.

Many U.S. politicians will turn their attention to areas — such as trade in services, intellectual property rights, and the U.S. budget and trade deficits — that are of particular interest to the United States. In many instances, U.S. political interest in Canada will decline. Canada must not let the gains it has made in dispute settlement lapse to the detriment of Canadian exporters to the United States. It cannot afford to let the trade dispute system revert to the pre-Agreement status quo. What can Canada do to make sure this does not happen?

To implement the appeals system effectively, and to resolve as many as possible of the unanswered questions concerning their legal status, the administrative agencies in the two countries will have to consult with one another regularly, both at the working level (between the trade economists and business specialists) and at the legal level (among members of the ITC, the Canadian International Trade Tribunal, and the Chapter 19 panels). The familiarity with each others' systems that these meetings will generate may help to overcome many potential problems that could arise in the operation of the review panels.

To achieve a successful outcome in the subsidies negotiations with the United States, the Canadian government should encourage Canada's business sector to be involved in the examination of harmful U.S. practices. Canada could follow the green-light, yellow-light, red-light approach to subsidies negotiations that was proposed initially for the Tokyo Round of the GATT and that has resurfaced in the Uruguay Round.[20] Under this system, all green-light subsidies are noncountervailable, red-light practices are unacceptable, and yellow-light cases are examined on their own merit for their trade-distorting impact.

Other approaches have been suggested that call for the elimination of the use of antidumping and countervailing duty laws. Michael J. Trebilcock provides an excellent analysis,[21] with a suggestion that the Escape Clause under the GATT be substantially revised to account for the political reality that countries sometimes have no choice other than to protect a declining industry. In order to do this, however, the definition of "serious injury" — more substantial than the "material injury" requirement under antidumping or countervail — should focus not on injury to "a domestic industry" but "rather on serious injury to least advantaged workers and dependent communities, subject to the proviso that less drastic forms of adequate adjustment assistance are not available."[22] Political reality may dictate that Canada negotiate these measures with the United States in the Working Group after an initial effort in the current GATT Round.

Canada will require input from its exporters as to which U.S. practices are considered troublesome. These lists of U.S. subsidies, substantiated by detailed research as to their impact on U.S. industries and companies, will help Canada by providing information and a bargaining tool. Otherwise, the United States will be much

better prepared to negotiate on what it considers unfair Canadian subsidy practices, since these have already been widely studied by the ITC and the U.S. Department of Commerce during their investigations of countervail and antidumping cases against Canada. In contrast, Canada has carried out an insufficient number of detailed, sector-by-sector studies of the nature and economic impact of U.S. subsidies on Canadian business.

In setting its agenda for the Agreement's unfinished business, Canada needs to be prepared to make its case on the nature of U.S. subsidies and how the U.S. trade-law system has led to administered protection. These agenda items are relatively more important for Canada than for the United States. As a trade-dependent country, Canada cannot afford to let such key, market-enhancing provisions of the Agreement slip through its fingers.

To secure its objectives, Canada could use a triangular approach involving, first, political pressure; second, consultations with Canadian business, including exporters; and third, the development of better working relationships among individuals who are involved in subsidy negotiations and the dispute settlement mechanisms. With such an approach, Canada should be able to realize many of the opportunities that it anticipated when it signed the Agreement.

Notes

1. See Canada, Advisory Council on Adjustment, *Adjusting to Win* (Ottawa: Department of Industry, Science and Technology, 1989).
2. See, for example, Maureen Farrow and Alan M. Rugman, eds., *Business Strategies and Free Trade: Focus on Corporate Adjustment*, Policy Study 5 (Toronto: C.D. Howe Institute, 1988).
3. While Article 1907 of the Agreement does not explicitly say that antidumping rules will be examined, it can be assumed from Article 1907.1(b), which refers to "unfair pricing", that the Working Group will also examine this issue. While antidumping is important, this *Trade Monitor* focuses on the subsidy and countervail issue. Antidumping is not, however, mutually exclusive from countervail actions in the United States, since it is not unusual for both types of actions to be launched on the same case at the same time. Furthermore, while U.S. interests use countervail against Canadian business, both countries use antidumping actions to a comparable degree. The focus on countervail here reflects the authors' objective in proposing a Canadian agenda for the implementation stage of the Agreement.
4. For further details on Chapter 19, see Richard G. Lipsey and Robert C. York, *Evaluating the Free Trade Deal: A Guided Tour through the Canada-U.S. Agreement*, Policy Study 6 (Toronto: C.D. Howe Institute, 1988), Ch. 19; and Debra P. Steger, *A Concise Guide to the Canada-United States Free Trade Agreement* (Toronto: Carswell, 1988), Ch. 13.
5. See, for example, Stewart A. Baker, "Dispute Settlement under Chapter 19 of the Canada-U.S. Free Trade Agreement," *Canadian Law Newsletter* 13 (Spring 1989): 15–19.
6. See General Agreement on Tariffs and Trade, *Report of the Committee on Subsidies and Countervailing Measures* (Geneva, 1980–88).
7. See J. Michael Finger and Julio Nogues, "International Control of Subsidies and Countervailing Duties," *World Bank Economic Review* 1 (1987): 707–725.
8. See Canada, Department of Finance, *The Canada-U.S. Free Trade Agreement: An Economic Assessment* (Ottawa, 1988).
9. See, for example, Andrew Anderson and Alan M. Rugman, *Subsidies in the U.S. Steel Industry: A Conceptual Approach to the Literature*, Working Paper 14 (Toronto: University of Toronto, Faculty of Management, Ontario Centre for International Business, April 1989).
10. Some work has already been completed in Canada on U.S. subsidies at the industry level (see Ann Michel et al., *An Annotated Inventory of Federal Business Subsidy Programmes in the United States*, Discussion Paper in International Economics 3701 [Ottawa: Institute for Research on Public Policy, 1987]). See also Frank Beryl, ed., *Encyclopedia: U.S. Government Benefits* (New York: Dodd, Mead, 1985), a compilation which has been published since 1965; and National Association of State Development Agencies, *Directory of Incentives for Business Investment in the United States* (Washington, D.C.: Urban Institute, 1986). For a further evaluation of the use of U.S. countervail law, see Finger and Nogues, "International Control." For an evaluation of Canadian trade-remedy laws, particularly those pertaining to antidumping, see Alan M. Rugman and Samuel Porteous, "Canadian Unfair Trade Laws and Corporate Strategy," *Review of International Business Law* 3 (1989).

11. Alan M. Rugman and Andrew Anderson, *Administered Protection in America* (London: Croom Helm/Routledge; New York: St. Martin's Press, 1987).

12. As recorded by Rugman and Anderson, *Administered Protection*; and confirmed by Ronald A. Cass, "Economics in the Administration of U.S. International Trade Law" (paper delivered at the Ontario Centre for International Business Joint Workshop by the International Business and Trade Law Programme, Faculty of Law and the Research Programme, Faculty of Management, University of Toronto, May 31, 1989).

13. See Cass, "Economics in the Administration of U.S. Trade Law."

14. For a view of the benefits of the new dispute settlement mechanisms from the perspective of two U.S. trade-law experts, see Gary N. Horlick and Debra A. Valentine, "A View from the United States," in *Two Views on Dispute Settlement and Trade Laws in the Canada-U.S. Free Trade Agreement*, Trade Monitor 6 (Toronto: C.D. Howe Institute, October 1988): 2–5.

15. The Chairman of the Canadian International Trade Tribunal, John Coleman, has indicated that his agency has been given the ability to carry out general inquiries on Canadian economic, trade, or commercial interests (see John Coleman, "New Rules, New Institutions: The CITT" [paper presented to the University of Ottawa/Carleton University Conference on Living with Free Trade, the proceedings of which are to be published by the Institute for Research on Public Policy]). Thus, the Tribunal may be the agency best placed to investigate U.S. subsidy practices that Canadian traders indicate are causing them problems. In fact, if it completed a set of net-net analyses — that is, the net difference between the subsidies received by U.S. and Canadian firms — perhaps in conjunction with the ITC's economists, this would provide an extremely useful background report to the Chapter 19 Working Group.

16. As indicated in Michel et al., "An Annotated Inventory."

17. For an evaluation of U.S. subsidies and countervailing duty law, see Daniel K. Tarullo, "Beyond Normalcy in the Regulation of International Trade," *Harvard Law Review* 100 (1987): 546–626.

18. See M. Jean Anderson, "Resolving Trade Disputes through Binational Panels and Extraordinary Challenges: Issues in Implementing Chapter 19 of the Canada-United States Free Trade Agreement" (paper presented to the University of Ottawa/Carleton University Conference on Living with Free Trade, the proceedings of which are to be published by the Institute for Research on Public Policy).

19. See Andrew Anderson and Alan M. Rugman, "The Canada-U.S. Free Trade Agreement: A Legal and Economic Analysis of the Dispute Settlement Mechanisms," *World Competition: Law and Economics Review* 13 (1989).

20. See Gary C. Hufbauer and J. Shelton Erb, *Subsidies in International Trade* (Washington, D.C.: Institute for International Economics, 1984).

21. Michael J. Trebilcock, "Reforming Trade Remedy Laws," Working Paper, Faculty of Law, University of Toronto, 1989.

22. Ibid., p. 13.

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